

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP661-CR

Cir. Ct. No. 2012CF305

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LUCAS J. ST. MARY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Reversed and cause remanded with directions.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Lucas St. Mary appeals from a judgment of conviction for possession with intent to deliver less than 200 grams of marijuana, in violation of WIS. STAT. § 961.41(1m)(h)1. (2011-12).¹ St. Mary pled no contest to the charge after the trial court denied his motion to suppress evidence gathered after a drug-detection dog called to the scene of the traffic stop at issue alerted Winnebago county sheriff’s deputies to the presence of drugs in St. Mary’s vehicle. He contends the deputies violated his Fourth Amendment rights when, “after concluding the traffic stop [related to St. Mary’s expired driver’s license], they continued to detain him without reasonable suspicion of criminal behavior” so the dog could sniff the exterior of the vehicle, which ultimately led to the discovery of the drugs. Because we conclude that our recent decision in *State v. House*, 2013 WI App 111, 350 Wis. 2d 478, 837 N.W.2d 645, governs, and we agree with St. Mary that he was being unconstitutionally detained when the dog alerted to the subject evidence, we reverse the trial court’s denial of his motion to suppress and the judgment of conviction, and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 In deciding the motion to suppress, the circuit court considered testimony provided at the motion hearing, as well as squad video. Winnebago County Sheriff’s Deputy David Roth and Detective Weitz² stopped St. Mary’s vehicle after “running” the license plate of the SUV he was driving and

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Winnebago County Sheriff’s Department Detective Weitz’s first name is not part of the record.

discovering that the SUV's owner, St. Mary, had an expired driver's license. While writing a warning ticket for St. Mary, Roth requested that Deputy Stefani McMillan, who worked with a drug-detection dog, come to the traffic stop location to conduct a "dog sniff" of the vehicle. Upon McMillan's arrival, Weitz removed St. Mary and his passenger from the SUV and directed them to the front of Roth's squad. McMillan testified that the dog sniffed around the vehicle and eventually alerted on it. McMillan subsequently found marijuana within the vehicle. While Roth testified that before he left his squad with the warning ticket, McMillan had already paraded the dog around the SUV, the dog had alerted to the car, and McMillan had entered the SUV and found the marijuana, he also acknowledged that he had neither reviewed his report nor the squad video of the six-month-old incident prior to the hearing. Roth stated that the purpose for the stop was concluded once he handed St. Mary the warning ticket.

¶3 St. Mary was arrested and charged with possession of marijuana with intent to deliver. He moved to suppress the evidence obtained following the dog's alert on the vehicle. After a hearing where Roth and McMillan were the only witnesses, the trial court found that, based on the testimony and its viewing of squad video,

there was the stop, there was a warning given by the other officer on scene, and it appears that as that warning is being provided the dog is conducting—with the handler—the evaluation or search of the vehicle, that there was some discussion with the officer—Officer Roth—and the defendant regarding the warning, and that there was a short period of time in which then Officer McMillan and the dog do indicate or hit on the suspected location of the drugs.

The court agreed with defense counsel that the purpose of the stop had ended prior to the dog alerting to the drugs; however, because of the short time between the end of the stop and the alert, the court also concluded that St. Mary's continued

detention until the alert occurred was constitutional. The court denied the motion to suppress. St. Mary then pled no contest and appeals his judgment of conviction and the denial of his motion to suppress.

DISCUSSION

¶4 Whether a seizure is constitutional is a question of constitutional fact. *House*, 350 Wis. 2d 478, ¶4. We will uphold the trial court’s findings of historical fact unless clearly erroneous. *Id.* Where the trial court’s findings of fact are based in part on a video recording of the event and in part on disputed testimony, the findings remain subject to the clearly erroneous standard of review. *State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898. However, “whether the trial court’s findings of historical facts pass constitutional muster is a question of law we review de novo.” *House*, 350 Wis. 2d 478, ¶4.

¶5 The constitutions of the United States and Wisconsin protect an individual’s right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV; WIS. CONST. art. I, §11. The reasonableness of a seizure in the context of a traffic stop “depends on whether (1) the seizure was justified at its inception and (2) the officer’s action was reasonably related in scope to the circumstances which justified the interference in the first place.” *House*, 350 Wis. 2d 478, ¶5 (citations omitted). The Supreme Court has held that a person “may not be detained even momentarily without reasonable, objective grounds for doing so.” *Florida v. Royer*, 460 U.S. 491, 498 (1983). Applying *Royer* in our analysis in *House*, a recent dog sniff case, we held that “[w]here the reasons justifying the initial stop have ceased to exist because the purpose of the stop has concluded, further seizure is beyond the scope of the initial stop.” *House*, 350 Wis. 2d 478, ¶6 (explaining that “whether an investigative detention is reasonably related in

scope to the circumstances justifying the stop depends on ‘whether it lasted “no longer than is necessary to effectuate the purpose of the stop”’ (quoting *Royer*, 460 U.S. at 500)).

¶6 St. Mary does not challenge the initial stop. His sole contention on appeal is that he was unreasonably seized between the time the purpose of the traffic stop concluded and when the dog alerted to drugs in the vehicle, and therefore, all evidence following from the alert should be suppressed. The State does not contest that St. Mary did in fact remain seized through the dog sniff and the dog’s alert to the drugs. As in *House*, the question before us here is whether St. Mary’s continued detention after Roth handed him the written warning “was reasonably related in scope to the purpose of the stop.” *Id.*, ¶5. We conclude it was not and reverse.

¶7 In *House*, the officer stopped a vehicle when he observed that it was being operated with a suspended registration. *Id.*, ¶2. The officer testified that he asked House to exit the vehicle, gave House back his license, and handed him a written warning for the suspended registration. *Id.* He further testified that the traffic stop was completed at that time, “but that House would not have believed that he was free to leave.” *Id.* The officer then conducted a dog sniff of House’s vehicle that revealed a bag of marijuana, and House was arrested. *Id.* After the trial court denied the motion to suppress, House ultimately pled no contest to the charges and appealed. *Id.*, ¶3. We reversed, concluding that based on these facts, “the reasons justifying the initial stop ceased to exist because the purpose of the stop had been resolved [once the officer handed House the warning]. Therefore, [the officer’s] continued detention of House to conduct the dog sniff was not reasonably related in scope to the circumstances justifying the stop.” *Id.*, ¶10.

¶8 Here, the trial court found that the written warning had been provided to St. Mary and the purpose of the stop had ended prior to the dog alerting to possible drugs in the vehicle. Our review of the evidence, particularly squad video, confirms these conclusions. The purpose of the stop was to investigate and address St. Mary's driving with an expired license. The seizure of St. Mary was extended beyond the conclusion of this purpose solely to provide the dog time to sniff around the vehicle in search of drugs. The dog sniff leading to the drug alert was not related to the purpose of the stop. Once the purpose of the stop had ended, constitutional justification for continuing St. Mary's seizure also ended. Accordingly, St. Mary's continued detention after being handed the written warning was unconstitutional and any evidence gathered from the subsequent dog alert must be suppressed.

CONCLUSION

¶9 For the foregoing reasons, we reverse St. Mary's judgment of conviction and the trial court's order denying the motion to suppress the evidence obtained after the dog alert. We remand for further proceedings consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

